PREPUBLICATION REVIEW AND SECRECY AGREEMENTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT

OF THE

PERMANENT

SELECT COMMITTEE ON INTELLIGENCE

HOUSE OF REPRESENTATIVES

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hand, and then not covering up embarrassments on the other, as if they were two polar opposites, whereas in fact there are enormous grey areas between what is and what isn't, and how close can you get to saying something that does or does not reveal something.

Mr. COLBY. I don't feel muscled on that, Mr. Chairman, because I think that the basic understanding I undertook when I went into the relationship years ago was that they would make the decision, I wouldn't.

And you asked about the French edition of the book.

Mr. ASPIN. Yes; I was going to ask.

Mr. COLBY. And that I think is a fair evidence of this, just as this other incident.

I found a reasonable basis for the Agency's position with respect to the statement they asked me to stop saying. I understand why they said it. It's all right. I didn't think it was any earthshaker, but they have a right to make that decision.

On the French edition of the book, what happened was that I sent the draft of the book to the Agency, then sent the same draft to the publisher with a note saying that the Agency has this book, they are going to review it, and they will probably ask for some modifications in it, or I don't know whether they will or not, but if they do we are going to have to make them before we publish here, before we publish, period.

They had made an arrangement with a French publisher who wanted to get started on the translation very quickly, and so they made a Xerox and sent the thing over to the French publisher to begin translating. When the Agency and I had negotiated out the few differences we had, I informed the publisher of what was not authorized and what then had to be changed or taken out, and he did as we had agreed, but he forgot to pass it on to the French. I had assumed that he had, of course, since I had dealt only through him.

A comparison of the two texts shows the original versus the final. There were a couple of newspaper articles on it which showed that the differences weren't of any worldshaking quality, but nonetheless I accept the point that the Agency should make that determination. They have a sense of what today they want to keep and what they don't, which may be different from mine from yesterday, and I don't find any argument with that. I accepted the discipline of the Agency in that regard. I am sorry this mistake occurred, and I have done something that I should not have done.

Now, should the Agency sue me and take away at least the French royalties? Maybe so, but certainly I tried to comply with the rules and failed in that case, but it wasn't a matter of bad will, it wasn't a matter of rejection of the discipline; it was a stumble.

Mr. ASPIN. But, again, its goes to the administrative difficulties, because even that, isn't that a technical violation of the agreement? I mean, technically speaking, should you not have completed the text and then cleared it with the Agency and everything before you even talked to the publisher, I mean, before he even saw any manuscript?

Mr. COLBY. Possibly. I would leave that to a rather specific, detailed legal analysis. I was under the impression that it referred to what was actually published with respect to a manuscript of this nature.

Mr. ASPIN. You see, the difficulty is I think an author under these guidelines has a great problem because he would not even be able to work with a publisher or with an editor at the publishing house unless that editor was also cleared and, you know, had——

Mr. COLBY. Well, I had a collaborator on writing mine, and I made it clear to him that I was not going to tell him anything that was beyond my limits. He was going to be in a situation that anything I told him was in my view totally unclassified and within the rights.

Now, in that single respect I was wrong, no question about it.

Mr. HALPERIN. May I just make a comment on that?

Mr. ASPIN. Yes.

Mr. HALPERIN. I think the regulation is absolutely clear. It talks about disclosure to anyone. The Agency's position again in the *Snepp* case is that it is not that Snepp revealed something that he should not have, it is that he made the judgment about what to reveal, which Mr. Colby did to his collaborator, and then to the American publisher, to all the employees of the American publisher, to the French publisher, to all the employees of the French publisher. I don't know the process by which that manuscript moved from the United States to France, the question of whether that was secure.

In other words, if you take the Agency's position that they have to be able to assure a foreign source that they will make all those judgments, the question then becomes are the collaborators of people writing books cleared by somebody? They aren't. Are the publishers cleared? We know the CIA had agents in the publishing houses that told them about the Marks and Marchetti book. Does the KGB have agents in publishing houses, or in French publishing houses? And I think that if you look at the process that went on with Mr. Colby's book, leaving aside the possible allegations of bad faith in the case of Snepp, which was not in the lawsuit, the same control that the Agency insists it needs was lost in the case of that book because of these exposures to the person who was his collaborator on the book and all the people in the two publishing houses.

Now you go to the other extreme, according to the Agency, if Frank Snepp had gone on national television live on "60 Minutes," as he did to some extent, and revealed everything in his book, he hasn't violated anything.

You put that all together, and I think you have just got an absurd system, where you claim that you can give assurances to people, that the Agency will make the judgment, when manuscripts are shown to publishers and collaborators and people talk on television, and what you are protecting in between are some people's book manuscripts.

Mr. COLBY. I would say just in some defense that the differences I think can be seen as not the sorts of things that would upset foreigners very much. In every one of those cases, I leaned over as far backward as I could to protect the foreigners, and the few excerpts here that the Agency took a position about don't involve foreigners, as I remember.

Mr. LYNCH. I agree with Mr. Colby's view of that, but I also ought to point out that I am involved in one freedom of information case where the Agency is withholding documents, and we are saying that they should be released because they deal with what has been revealed in Mr. Colby's French edition, and the Agency has taken the position,

no, we can't release them, they will cause identifiable damage to the national defense and foreign relations, and that Mr. Colby's French book should be dismissed as rumor and speculation and not the official confirmation of the U.S. Government, and I think that is an absolutely preposterous situation. We will see what the courts think about it. But I agree with him, but the Agency doesn't agree with him, that those matters that appeared in the French book are indeed classified at the level of secret, not even confidential.

Mr. HALPERIN. Moreover, the Agency's position, again, is not that the Snepp book had classified information, but that they can't let other people make this judgment.

So even if there had been no deletions by the Agency from Mr. Colby's book, their position, argued in the *Snepp* case, was the fact that it was disclosed to other people without their first reviewing it is what causes the injury because of the confidence factor with other people, and they say about Snepp's book, even if he guessed totally right, which they conceded for the purpose of that litigation, he did harm to the national security.

Mr. COLBY. But the difference between myself and the *Snepp* case is that I made an effort to comply with their rules; he made an effort to avoid the rules, and I think that is the real distinction between them. That was what they were enforcing, is that they have a right to compel their people to comply with their rules.

Now, I had previously made the effort to comply with their rules, so that issue wasn't up between me and them. The issue there was whether something was released.

Mr. LYNCH. I, Mr. Chairman, ought to point out at this point that there have been a lot of references in these hearings to Mr. Snepp's conduct, and I am certainly not going to argue that today, but Mr. Snepp, I think I should point out, is in the process of preparing a submission to this committee to get on the record his views. As you know, we never got a trial on these issues, they were summarily dealt with on appeal, and I don't want to argue them, but there is another side, and Mr. Snepp is going to make it to the committee.

Mr. ASPIN. Well, I think his main point is that he did not mislead the Agency about whether he was going to submit the transcript; is that not correct? I mean, he has written to this committee and denied allegations by the CIA that he had continually promised to submit the book for review, and then the implication of the spokesman from the CIA was that he had gone back on not only his contract, but also on his promise, in other words, that Snepp had deliberately misled them. His point was that he did not mislead them, or he claims he did not mislead them, and his point is that what he did is—he doesn't claim that he followed the contract, but he does claim that he did not deliberately mislead them.

Mr. LYNCH. That's right. There is an enormous factual dispute as to what transpired in the meeting on May 17, 1976, between Mr. Snepp and Admiral Turner. But prior to that time Mr. Snepp had made it clear that he was not going to submit the book, he told many representatives of the Agency that, told them that he wasn't going to submit it because he didn't think he had to submit it. There is absolutely no question that the Agency knew that he was writing a book and what he was writing about. The only thing they didn't know was who his publisher was, but they—well, in fact they did know who his publisher was from another source. So they knew an awful lot about it.

But then there gets to this meeting on May 17 where there is a dispute in recollection between Mr. Snepp and Admiral Turner, and you will hear from Mr. Snepp on that.

Mr. ASPIN. Anyway, the point did leave us with a very interesting case on the enforceability of the contract, which is what we were looking for, and now we have got the judgment on that.

Mr. HALPERIN. Let me just make it clear, Mr. Chairman, that the allegations about whether he deceived affected some of these theories about how much money he might have to pay did not affect, as I understand it, the argument about whether he had violated his contract, and the violation of the contract came simply from the failure to clear. It would not have been satisfied if he had called up the Agency and said I am not going to clear this manuscript.

Mr. LYNCH. You see, the Agency began litigating this case on the ground that he didn't submit the manuscript, and then they began, as good lawyers do, to pour in anything they could, and they tried to make it look as if he had acted in bad faith, and then without a trial, the district judge, who does have a reputation for erratic behavior, concluded that he published surreptitiously, deliberately and willfully, and that he did it for money, and that has been picked up in the appellate courts and in the Supreme Court and in the press, and frankly, we feel it is a factual issue which is open and hasn't been resolved as it ought to be resolved, and has affected the whole climate of the case.

Mr. ROMERSTEIN. Mr. Lynch, you have indicated, or I guess Mr. Halperin indicated that the Agency has the option of getting an injunction in one of these cases. They did not get an injunction in the Snepp case because, as they testified here, they had the impression that he was telling them that he was going to have the book cleared. Now, that was the area of the deception, that he was going to have the book cleared, and avoided having them seek an injunction.

Mr. LYNCH. There is a lot of evidence that he told them very clearly that he was not going to have the book cleared, and that they were doing everything they could to assemble information that would have enabled them to go to court and get an injunction.

Mr. ROMERSTEIN. Why didn't they?

Mr. LYNCH. Because they didn't get any information that what was in his book was damaging to the national security. They had two people that were close friends of Mr. Snepp taperecording his conversations over what was in the book and giving them to the General Counsel's Office, and the Agency was trying to assemble a case for an injunction and couldn't do it.

Mr. ROMERSTEIN. But that wasn't the issue. They could get an injunction——

Mr. LYNCH. You asked why they didn't get an injunction.

Mr. ROMERSTEIN. They could have gotten an injunction because he was intending to violate his contract, the same issue that they eventually adjudicated.

Mr. LYNCH. You cannot get an injunction to force someone to comply with a contract unless you can demonstrate that you are going to suffer irreparable damage as a result of the breach of the contract, and since they were not able to ascertain that there was classified informa-

tion in the book, they were not able to make the case that there would be irreparable damage in the book, and they were not able to get the affidavits to go to court for an injunction.

Mr. ROMERSTEIN. That raises the other question that Mr. Halperin raised before. You said two contradictory things here today.

Mr. HALPERIN. Only two?

Mr. ROMERSTEIN. Two that contradicted each other.

You indicated that the Agency had never claimed that Snepp had revealed classified information, and later on you said, well, the Agency does say in fact that he revealed classified information.

You are fully aware that they said they proceeded with the case on the narrow issue of the question of the contract because there are various reasons, among them that they don't want to confirm the release of which information is classified. So you knew that you were not really stating what the Agency position was. The Agency position, as you know, and as you said the second time, was that he did reveal classified information, but they proceeded against him in a narrow area.

Now, do you know of any instance where a critic of the Agency had submitted a manuscript and was asked to delete material that——

Mr. HALPERIN. Let me, if I can comment on what you said, I thought I was careful to say—and play the tape to be sure—that the Agency, in writing the lawsuit, did not alleged that anything in the book was classified.

Mr. ROMERSTEIN. OK.

Mr. HALPERIN. I understand they are now saying—and maybe were saying before—that they do think there is material that is classified. I would be interested in seeing what it was. I can't find anything that is.

The issue, in my view, is not taking out criticism. I don't think that even in the Marks-Marchetti book sentences were deleted because they were critical of the Agency. I think the issue is the arbitrariness of the judgment about what is classified information or not, and that as Mr. Lynch has suggested, our experience already shows that one could have guessed at: if you are friendly to the Agency, if you are a former senior official, they will look at a sentence and say, well, it is hard to tell whether that is classified or not, but we are not going to have a fight with some former senior official about it. If you are Marks or Marchetti or Snepp, they look at that sentence and say, well, let's take it out, and there is a judgment call here about whether it is classified or not.

It is an absolutely human process, and I know when I was in the Government we would get manuscripts from the State Department to be cleared. If the manuscript was a speech by the Secretary of State and he had already seen it and we knew he wanted to say it, we would think a long time before saying a sentence in it is classified. If it was a junior Foreign Service officer who wanted to give a speech at a learned conference, we would take out sentences all the time because it is a judgment call about what is classified, and you are always asking yourself the question, who is going to call whom if I say this sentence is classified? That is the way it is—it is not in bad faith; it is an inevitable part of the system, and it inevitably means that different people get different things released. And that is arbitrary and capricious when you are talking about the writings of former officials.

Mr. ROMERSTEIN. Then you are not saying that the prepublication review procedures are being used as punishment against critics of the Agency. That is not your allegation, right?

Mr. HALPERIN. That the prepublication review? No. We are suggesting that it is an interesting fact that the only lawsuits have been brought against these critics.

Mr. LYNCH. The enforcement of violations of the review process is where we see a discriminatory and perhaps vindictive pattern.

Mr. ROMETSTEIN. But you only have two cases; and in those two cases, they refused to have them——

Mr. HALPERIN. Four. There are now four cases.

Mr. ROMERSTEIN. Four cases in which the Government has brought proceedings?

Mr. ASPIN. I can think of three. What is the fourth?

Mr. LYNCH. Marchetti, Snepp, Stockwell, and Agee.

Mr. ASPIN. Agee? What is the case on Agee?

I thought we don't have a case.

Mr. COLBY. They tried to counterclaim when he initiated a freedom of information suit.

Mr. LYNCH. And they succeeded over my most vigorous effort.

Mr. ROMERSTEIN. Well, Marchetti was B.C. We are talking about A.D. cases. You are only talking about cases of people where you have the prepublication procedure, people who have not submitted their manuscripts for prepublication review, and who have enough classified information in the manuscript.

Now, can you show us a case where somebody who was critical of the Agency but has had no classified material in his publication has been sued, or on the other hand, a case where a critic of the Agency, having submitted material to the Agency, has been asked to delete material that was critical as opposed to material that was classified.

Mr. LYNCH. Can we break it down? What was the first category?

Mr. ROMERSTEIN. The first category was an instance where a critic of the Agency has published and has not revealed any classified in his published material where the Agency has proceeded against him.

Mr. LYNCH. We believe the *Snepp* case falls into that category.

Now, I understand the Agency says there are a half a dozen items. Let me make a point about that. Mr. Snepp was the Agency press briefer in Saigon and was the person responsible at the station chief's direction for, on a daily basis, telling the press what the station chief thought the press ought to know. He was in a unique position and that, of course, we would agree was declassified if it was revealed to the press. He was in a unique position to know what about our operations in Vietnam had been declassified.

And at the beginning of the lawsuit, when we didn't know how the Agency was going to—whether they were going to allege classified information or not classified information, we of course, prepared for the eventuality of allegations of classified information, and we were ready to take that on with some confidence.

So I do think that Snepp is a situation where—well, even the testimony here indicates that the classified information in the Snepp book is marginal at best, and we think we could have demonstrated that it wasn't classified, that it had already been officially released.

Mr. ROMERSTEIN. I did not assume it was marginal. They indicated it was significant. But be that as it may, the allegation by the Agency is that there is classified information in there.

Is there a case where there is no allegation of classified where the Agency has proceeded against a former employee who is critical?

Mr. ASPIN. Give them a chance. They just got the *Snepp* decision.

Mr. ROMERSTEIN. Well, that is a problem.

Mr. LYNCH. All I can really go on is what they say in court, and in court they have not alleged that either Snepp or Stockwell have released classified information. Now, they come up here and they go around to the press and they say all kinds of other things. Well, I cannot deal with that. I can only deal with what they say to me in court.

Mr. ROMERSTEIN. What they said here is their criteria for bringing the case.

Mr. HALPERIN. Well, let me give you examples on the other side. I mean, I think we don't have either of the cases you suggest. We do have, I think, very clear cases on the other side, of noncritics of the Agency revealing information that is classified and not being sued.

You look at the Smith book, "Portrait of a Cold Warrior." I think it is a terrific book, I think it is an enormously valuable insight into how the Agency functions. The fact that the current ruler of a friendly country was a source of assistance and support to the CIA is a fact that the CIA would say is classified. They sold that very vigorously to the Washington Post about another ruler of a country. It is reported in the book. There's lots of information in that book that I think is unquestionably classified. He has not been sued. He did not clear the book.

This new book by Martin about counterintelligence, he not only says that he got a great deal of information from Angleton, which clearly could not be cleared if Angleton had submitted his manuscript because it is classified, but he says Angleton encouraged him to write a book with him. So here we have a situation where a former CIA official reveals information that the Agency thinks is classified to an author and says go write it up in a book. Now, the difference between that and his sitting down and writing the book himself, in terms of protecting sources of information, escapes me. I am not subtle enough to understand that.

And yet as far as I can tell, the Agency has still made no effort to tell Mr. Angleton that he ought to stop giving interviews to people and stop revealing information without a clearance. So we certainly have examples on that side of a judgment made on the basis of something that I don't understand that isn't on the record.

Mr. LYNCH. Miles Copeland is another one.

Mr. ROMERSTEIN. I agree with you on the first book, but that was prior to the time that there were prepublication procedures.

Mr. HALPERIN. The interviews with Martin?

Mr. ROMERSTEIN. The Snepp book.

Mr. HALPERIN. You could have fooled Marchetti and Marks. They were told they had an obligation.

Mr. LYNCH. And it was after Marchetti and Marks had been decided that Smith published his book.

Mr. ROMERSTEIN. But before the Agency set up the elaborate procedures they now have to review material, to review it within a certain time limit and so on. In the case of somebody who interviews former employees, that is a very difficult situation. How do you cope with somebody who sits down with a newsman and blabs what he knows? Then you need criminal procedures.

Mr. LYNCH. That's right.

Mr. ROMERSTEIN. But where you have available a manuscript, where you have some time element——

Mr. HALPERIN. But it is not a question of revealing sources. It isn't that Martin publishes his book and says I got this from secret sources. He says in the manuscript, I went to Mr. Angleton, he told me this information, said I should write it up in a book. As far as enjoining him from future interviews of that kind the record is absolutely clear, the Government in that case—and I will come back to the point you made about Marks and Marchetti—there the Government's complaint alleged there was about to be a disclosure of classified information, which is what distinguishes it from the *Snepp* case, and I think in their early considerations about whether they can sue Snepp, they thought in order to sue him they had to make and prove the allegation that they made against Marchetti, that he was about to reveal classified information.

In the case of *Angleton* there would be no problem at all. You have a record of a book and an interview identified in the book as the source of information. You would have no trouble at all convincing the judge even in the District of Columbia that he is in fact—that he has in fact previously revealed classified information and getting an injunction.

Mr. ASPIN. But I think that the difference between the Smith book and the Snepp book is very instructive. They both occurred at a time before the elaborate procedures were set up. We went through all of that, and you know, they set up the procedures finally at approximately the date that Snepp's book came out. I mean, he would have had to have submitted it 6 months before. And in one case you have got a case of a man who is a critic and maybe there is some classified information there, but a very little bit. In the other case you have got a guy who is a defender of the Agency and a lot of classified information, and they brought the prosecution against the one and not against the other.

Let me go on, if I could, just to ask both of you the implications of where we are going with all of this. I would like to raise the issue of where we proceed from a congressional standpoint or an administrative standpoint, or whatever, where we would proceed from here.

And let me ask maybe first Mark Lynch. You say we should not legislate, your view is that if we legislate in this area, we are going to reduce the chance that the Supreme Court might say something which you would find more acceptable at a later point on another case.

Mr. LYNCH. That is my secondary reason for urging against legislation.

Mr. ASPIN. The first is that we don't know enough about what to say.

Mr. LYNCH. That's right. For example, I think the committee might determine after some study that insisting on the deletion of information which is only classifiable at the level of confidential might not

make sense. There is so much information which can be classified confidential, you may want to raise the standard. You might not want to buy in to the standards that the Agency is applying right now. That is one.

The other thing is that some solution has to be reached on this speech problem. We can't have some people confidently talking to reporters, knowing that they won't get nailed, and other people who are critical of the Agency terrified that anything they say will lead to legal action. The situation at the moment is just fraught with vagueness and uncertainty and is the worst kind of situation from any sensible legal point of view.

Mr. ASPIN. So, we have got three options, the "malign neglect" option, the legislative option, and the administrative reform option.

Mr. LYNCH. Vigorous oversight option.

Mr. ASPIN. The fourth, I guess, is a vigorous oversight.

All right, you do not advocate "malign neglect."

Mr. LYNCH. No.

Mr. ASPIN. You do not advocate legislation. How about if we were to request in an authorization bill or some way for the intelligence community to standardize procedures and standardize the different classifications and systems; make this thing as equitable and fair as possible. How about a system which would encourage that by something in legislation that says to the CIA or to the intelligence community, we would request that you establish procedures for this and we would like the procedures to take into account the various concerns dealt with in this hearing; in other words, encourage them.

What are your views on that?

Mr. LYNCH. I am very leery of that approach, getting into my second concern that Congress express, through the authorization process or otherwise, approval of a system of prior review. I think that would be very unfortunate.

It might be possible, although I tend to doubt it, to work into legislative language the kind of requirements that you are talking about also with an expression of neutrality. That would be very difficult to do. I think you can probably accomplish these results without having to commit anything to legislative language. I think this committee has enough clout with the intelligence community to wring out of them the kind of regulations and reporting and so on that you might see putting into authorization language.

Mr. ASPIN. Maybe. I'm not so sure anymore.

Mr. LYNCH. Let me say something else, too. I think that the approach here has got to be—and this may raise some jurisdictional problems to this committee, but I think the approach has to be broader than just the intelligence community. I think the Justice Department bears an enormous amount of responsibility for this monster that creative lawyering has wrought, and I think that, as typically happens in other areas when a court decision comes down with broad implications, it is very much the job of the Office of Legal Counsel and the Attorney General to provide some narrowing and some administrative guidance, and I think it is very important that the Justice Department be brought in on this.

Another thing that could be done administratively is to make it clear that this constructive trust remedy will not be applied against publishers.

Mr. ASPIN. Yes. You know, you can see the outlines of whatever changes. You know, there are various areas that are pretty clear what needs to be—I mean, first you have to lay out which agencies it ought to apply to. You know, it is not clear now that other agencies couldn't get into the act other than what we consider to be the intelligence agencies—maybe Agriculture or somebody else could end up having secrecy agreements.

Mr. LYNCH. Oh, on that score, the intelligence community, properly and understandably, thinks that sources are its most important product.

Mr. ASPIN. Right.

Mr. LYNCH. People at the Federal Reserve feel just as strongly about the banking information, that if that gets out it will destroy the national economy. People at the Federal Trade Commission feel that strongly about the trade secrets that the eight major oil companies submit to them. Everybody thinks that what they deal with is the most important secret in the world, and almost every agency in town would be able to make a convincing case along the lines that the Agency has made in this situation.

Mr. ASPIN. You can see the issues that need to be resolved. The issue of who does it apply to, what kinds of things can be reasonably deleted from the manuscript, the procedures for doing it, you know, a time limit, a review process—that seems fair. The question about whether you are talking about literally everything, speeches and lectures as well as everything else, the question of what the penalties ought to be and the question of does it apply to third parties, does the constructive trust apply to the publisher, and you know, these are things that could be worked out. As you say, it would be tough for us to write the law on that now because I don't think we know enough about it. But it might be done by encouraging the administration to come up with some kind of guidelines, or the intelligence community to come up with guidelines. Guidelines are easier to change if you find they are unworkable than a law is to revise, and also, as you say, we don't know a lot about it.

But you still are concerned that if we encourage that through some legislation, we would be therefore giving our imprimatur of approval to the process, and you don't want to do that.

Mr. LYNCH. Yes. There are a lot of cases where an argument is successfully made that Congress implicitly improves an executive activity by funding it, specifically funding it, and it is a very tricky area of legal argumentation.

Mr. ASPIN. What would be the legal argumentation on this? Suppose you are arguing in a future Supreme Court case that you wanted a different outcome than the *Snepp* decision and we had, in effect, put into an authorization bill or maybe into the charters some directive to the intelligence community saying please develop guidelines and publish those guidelines concerning the prepublication review process, keeping in mind the following kinds of issues.

Mr. LYNCH. I am afraid I know what the Justice Department would argue, and they would say, Congress having directed the Agency to develop regulations obviously approves of the activity with respect to which the regulations are developed.

Now, you might say that, as I say, it would be possible although very difficult, and I wouldn't want to put my eggs in this basket, to preface any kind of direction with some expression of neutrality; the

old national security proviso on the wiretap statute comes to mind, that Congress doesn't take a position with respect to whether or not this is constitutional, but if it is, we are exercising our authority.

But I wouldn't encourage that, and I think you can perform your oversight function and get the requisite amount of information out of the Agency without going down that road.

Mr. ASPIN. Mr. Colby, what would you say about all this?

Mr. COLBY. Well, I think that the first priority is a criminal sanction, criminal statute, very simply. Now, in addition to that you could have, if you wanted to, an amendment to be voted on separately, that that be an exclusive remedy. That would shake out whether the House as a whole would adopt only the criminal sanction or whether they want to retain the contract approach as well.

If that failed, you could put in some general—then I regret to say I find myself in some agreement with Mr. Lynch on this, that I think that you would hold up the whole process so long in trying to stumble around and find out how to handle this problem that we would lose a couple of years on the criminal statute. And for that reason I would say that you just leave it out, just don't mention it. I think the criminal statute stands on its own.

This problem could be the result of some study and development of guidelines as to what you think is appropriate and what isn't, and you can put in the criminal sanction that any other remedies will be the subject of detailed regulations to be drawn up by the President and submitted to the committees. That way you would force the administration into defining some guidelines which you then could review rather than have to originate.

Mr. ASPIN. Right. And if you said "any other," then you would not be putting any support to the idea of particular prepublication——

Mr. COLBY. Yes; any other, including the administrative ones, of course.

Mr. ASPIN. OK.

Mort, did you have anything to add on that?

Mr. HALPERIN. I think it is a mistake to try to legislate at this point, and I think it ought to be possible—I mean, the Agency does have guidelines, and its seems to me that if you call them back and press them on their answers to these questions——

Mr. ASPIN. The problem is the Agency has guidelines, DIA has guidelines, Justice has guidelines and NSA has guidelines. They all have different guidelines, and all of them have a more or less sophisticated review process depending on how much business they do.

Mr. HALPERIN. Yes; but I really go back to what Mark Lynch suggested. I think that there is a requirement here that the Justice Department get into the act and try to standardize these procedures. These are procedures that affect the first amendment rights of both the writers and the readers of those books, and I think there is an obligation of the administration to come up with some uniform standards, and that the way to do that is not in an authorization bill for the intelligence community but by trying to persuade the Justice Department that it has a responsibility here and an obligation.

Mr. LYNCH. But just to emphasize again, as Mr. Colby has, the best solution is the criminal approach, as an exclusive remedy. And it may be a diversion of energy and resources to fiddle around with these other, you know, trying to regularize the current system.

You know, you mentioned NSA. As I understand from these hearings, they don't have a review requirement, and I think one of the reasons for that is they have a very clear statute on cryptographic information. If you have a strong—and they certainly have not had anywhere near as many problems as CIA has had in disclosures. If you have a good, solid statute, these other problems evaporate.

Mr. ASPIN. I don't know that that is attributed just to the statute.

Mr. ROMERSTEIN. Would you want to extend the NSA statute to cover sources and methods of other intelligence agencies?

Mr. LYNCH. Well, as we have indicated today, we would go for actual identification of sources which I think is the human intelligence agency's analog to cryptography.

Mr. ROMERSTEIN. Under the terms that are in the law concerning the NSA, you would want that whole thing broadened to sources and methods?

Mr. LYNCH. Sources. Methods is much more difficult.

Mr. ROMERSTEIN. Sources.

How about sources? You would agree that the concepts in the law relating to NSA should be broadened to sources of CIA?

Mr. LYNCH. The general approach. I have not looked at that statute in the past 30 days, so I don't want to buy into it completely, uncritically, but the general approach that we have discussed today; yes.

Mr. FUERTH. I think possibly in the next couple of days we will see a new version of the Senate's charter bill, but referring to the version which still exists, if the sections of that bill that have to do with names of agents were to be passed, would that in fact realize the criminal standard that Mr. Colby is talking about?

Mr. HALPERIN. I think the answer to that is "Yes," it does not deal with techniques which we discussed a little bit.

Mr. COLBY. I would like to see some narrowly defined technology.

Mr. FUERTH. We are already talking about 95 percent of what you were referring to.

Mr. HALPERIN. There are two problems with the current draft. One is it reaffirms the sources and methods authority of the Director of Central Intelligence, and I think there is a serious question of Congress reenacting that authority in the face of the Supreme Court decision saying it is ample authority for the prepublication without saying something about that, and I think what has got to be done in the legislative history of the charter is to make it clear that in enacting the criminal remedy and in enacting the sources and methods, that Congress intends that the criminal penalty is the sole remedy in the courts, and that the Director shall exercise his authority to protect sources and methods administratively or at the Justice Department through the imposition of criminal sanctions, but that Congress does not intend to continue, in effect, this contract system.

I am afraid that all of this discussion about whether you enact regulations will not be irrelevant, but it is at least as important to insure that Congress does not reenact without saying something about it the precise language that the Supreme Cour has now said justifies these prepublication reviews.

Mr. FUERTH. If you could get that language, it might be all well and good. But it is a fact that what you might get is the status quo insofar as the *Snepp* decision is concerned and a charter that contains the names of agents provisions, but without the legislative provision you are talking about.

Mr. HALPERIN. We expect this committee will write that in.

Mr. FUERTH. Which would add up as a matter of, you know, discussion, to what is the best public policy here. To mandatory prepublication review? The right of injunction and the right, if all those things fail, to apply criminal sanctions against someone who reveals the name of a source.

So the particular public policy you are advocating, if I understand it correctly, has the risk that it could lead to the worst of all possible worlds from your point of view.

Mr. LYNCH. I suspect that if we ended up with that worst of all possible worlds, we would find that a real sticking point on the whole charter enterprise.

Mr. ASPIN. Thank you all very much for coming. It was very, very useful, very helpful.

Thank you.

[Whereupon, at 11:56 a.m., the subcommittee recessed subject to the call of the Chair.]